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Supreme Court, U.S.
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No. 00-1607

IN THE
Supreme Court of the United States

PHIL PARKER, WARDEN,
Petitioner

versus

EUGENE WILLIAMS GALL, JR.,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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11 pp

CAPITAL CASE

QUESTIONS PRESENTED

I. IN PROCEEDINGS UNDER 28 U.S.C. SECTION 2254, SHOULD FINDINGS OF FACT MADE BY THE U.S. DISTRICT COURT THAT ARE CONSISTENT WITH THE STATE COURTS' FINDINGS AND BASED UPON THE STATE COURT RECORD BE REVIEWED BY THE U.S. COURT OF APPEALS UNDER THE CLEARLY ERRONEOUS STANDARD OF RULE 52(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE OR UNDER A *DE NOVO* STANDARD THAT ALLOWS THE U.S. COURT OF APPEALS TO INDEPENDENTLY DETERMINE THE FACTS?

II. DO JACKSON V. VIRGINIA, 443 U.S. 307 (1979), MOORE V. DUCKWORTH, 443 U.S. 713 (1979), AND 28 U.S.C. SECTION 2254, ALLOW THE U.S. COURT OF APPEALS TO INDEPENDENTLY ASSESS AND RE-WEIGH STATE COURT EVIDENCE, TO REJECT STATE COURT DETERMINATIONS OF STATE LAW, AND TO REVIEW CLAIMS NOT PRESENTED TO THE STATE COURTS?

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Comes the Attorney General of the Commonwealth of Kentucky as counsel for Petitioner, Phil Parker, Warden, Kentucky State Penitentiary, and states for his reply brief in response to Respondent Gall's Brief in Opposition to the petition for writ of certiorari as follows:

ARGUMENT

The Attorney General disagrees with Gall's discussion of the certiorari petition and the opinion of the Sixth Circuit panel. The opinions of the lower courts in this case are set forth in the appendix to the certiorari petition; so these opinions need not be discussed in detail again in this brief.

Gall's brief in opposition substantially ignores the questions presented as set forth in the certiorari petition.

The Sixth Circuit panel majority erred by applying a *de novo* standard of review to findings of fact by the U.S. District Court rather than a clearly erroneous standard. (231 F.3d at 283; Apx. 13). This issue was preserved in the standard of review section of the Attorney General's brief in the Sixth Circuit (pp. xx-xxi). The argument that the clearly erroneous standard applies to findings of fact made by the U.S. District Court based upon the state court record is supported by the Court's recent opinion in Lackawana County District Attorney v. Coss, 121 S.Ct. 1567 at 1575-1576 (April 25, 2001) (plurality opinion).

The Sixth Circuit panel's analysis of the extreme emotional disturbance issue is flawed because it ignores the factual findings of the U.S. District Court and Kentucky Supreme Court and fails to give appropriate deference to the Kentucky Supreme Court's interpretation of Kentucky law. (231 F.3d at 286-306; Apx. 18-56). The Sixth Circuit panel majority fails to invoke any exception to the statutory presumption of correctness regarding the Kentucky Supreme Court's factual finding that no evidence was presented to create any issue about whether Gall suffered from extreme emotional disturbance at the time of the murder, as required by the Kentucky murder statute, KRS 507.020(1)(a). The Sixth Circuit panel majority improperly rejected the Kentucky Supreme Court's interpretation of Kentucky law that evidence of insanity or mental illness is not sufficient **by itself** to establish extreme emotional disturbance at the time of the murder. (697 S.W.2d at 107-110).

To the extent that the Sixth Circuit panel majority relied upon Bouie v. City of Columbia, 378 U.S. 347 (1964), to reject the Kentucky Supreme Court's

interpretation of Kentucky law, the Sixth Circuit's opinion (231 F.3d at 304-305; Apx. 53-56) is erroneous under this Court's subsequent interpretation of Bouie in Rogers v. Tennessee, 121 S.Ct. 1693, 2001 WL 501579 (May 14, 2001). The Rogers opinion explains, contrary to the Sixth Circuit's opinion in this case, "[G]iven the divergent pulls of flexibility and precedent in our case law system, incorporation of the Calder [v. Bull, 3 Dall. 386, 1 L.Ed. 648 (1798)] categories into due process limitations on judicial decision making would place an unworkable and unacceptable restraint on named judicial processes and would be incompatible with the resolution of uncertainty that marks any ending legal system." 2001 WL 501579, at p.*6. (Internal quotation marks and citations omitted.)

The Attorney General notes one of the many apparent internal inconsistencies in the Sixth Circuit's opinion is that immediately after stating that it relied upon Bouie, the opinion states that it is not addressing **Gall's Bouie argument.** (231 F.3d at 306 and Fn. 19; Apx. 55-56).

The fact that Gall's case was decided under the pre-AEDPA version of 28 U.S.C. §2254 is not significant to the questions presented because the presumption of correctness on state court findings, requirement of deference to state court interpretations of state law, and procedural default doctrine existed before and after the AEDPA amendments to the habeas statute. In fact, the Sixth Circuit's opinion in this case is being cited as controlling legal authority by attorneys representing habeas petitioners in federal court where petitions are subject to review under the AEDPA because their petitions were filed after its enactment.

Because the Sixth Circuit's opinion in this case applied erroneous legal standards and has the potential to invalidate other Kentucky murder convictions and death sentences, this Court should review the ruling by the Sixth Circuit in this case.

CONCLUSION

WHEREFORE, the Attorney General of the Commonwealth of Kentucky requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,
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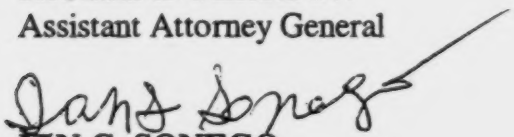
RICKIE L. PEARSON
Assistant Attorney General



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